IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1943 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GOVINDBHAI GELABHAI PATEL

Versus

MADHABHAI PRABHUDAS PATEL

Appearance:

MR PK JANI for Petitioner

MR RC JANI for Respondents

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 03/05/96

ORAL JUDGEMENT

1. This Civil Revision Application is preferred by the original plaintiff against the judgment and order dated 25th of August, 1995 passed by Civil Judge, Junior Division, Unjha, whereby the trial court has rejected the application at Exhibit 105 for amendment of plaint filed by the plaintiff under Order 6 Rule 17 of C.P. Code on the ground that earlier application for amendment of plaint which was filed at Exhibit 56 was rejected on 9th of July, 1993 and hence the second application was barred

by principle of res judicata.

2. The petitioner plaintiff instituted a Regular Civil Suit No. 149 of 1990 in the Court of Civil Judge at Unjha for declaration that he has a right of way in the open parcel of land admeasuring 13 feet x 40 feet on the southern side of the plot of defendant bearing Revenue Survey No. 2168/1 and for further declaration that the defendant has no right to put up construction over such land. He also prayed for permanent injunction restraining the respondents defendants from putting up any construction on the said open land.

3. The petitioner plaintiff applied for temporary injunction by Application at Exhibit 5 and the trial court initially granted order of maintenance of status quo requiring the defendants to maintain status quo over the said parcel of land. It appears that despite such injunction directing the defendants to maintain status quo of the open part of the land, the defendants continued to put up construction and in fact completed the construction. Since the defendants had in blatant disregard of the order of the court, put up construction, plaintiff moved an application at Exhibit 56 on 24th April, 1990 inter alia praying to amend the plaint and claiming that the respondents plaintiffs be directed by way of mandatory injunction to remove the unauthorised construction which they have made in violation of the order of injunction.

4. The petitioner plaintiff thereupon tendered an application for appointment of court commissioner and the trial court granted such application. The application was given on the ground that defendants have put up construction in breach of the order of injunction after such order was served on them. The court commissioner prepared his report and panchnama dated 12th of February, 1995 and from such report it was found that the defendants have put up substantial unauthorised construction in the open land by constructing a stair case, lavatory, bathroom, water tank, etc. below such stair case and that above such construction, lavatory, bathroom and gallery are also constructed by putting up RCC slab. Such construction was an act of interference with the right of way which the plaintiffs were enjoying on the open parcel of land and therefore they filed Application at Exhibit 110 to amend the plaint by adding Para 3 (1)(2)(3) in the plaint and also wanted to amend the paragraph containing cause of action as well as the relief clause.

5. Such application was resisted by the defendants by filing their written reply and they have inter alia contended that they had put up construction even prior to one year of the date of institution of the suit and that they have by pursis at Exhibit 51 dated 22nd January, 1990 disclosed to the court that they have already completed construction. They further contended that the plaintiff had thereafter given the application at Exhibit 55 dated 24th April, 1990 for contempt of court as breach of order of injunction was allegedly committed and they also filed application at Exhibit 56 for amendment of the plaint. Such application for amendment of the plaint at Exhibit 56 having been rejected, they contended that under the principle of res judicata, the second application cannot be entertained and is liable to be rejected.

6. The trial court reached the finding that second application was barred by principle of res judicata under Section 11 of CP Code and hence rejected the application.

7. Mr. P.K. Jani, learned Counsel appearing for the petitioner plaintiff has submitted that strictly, legally principle of res judicata would not apply to the fact situation obtaining in this case as the ingredients of Section 11 of the Code are not satisfied. Section 11 of the Code in so far as it is material is reproduced hereunder:

> Res judicata.
> 11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which suit issue has been subsequently raised, and has been heard and finally decided by such court..

8. Based on the aforesaid provision it was submitted that there is no second suit instituted between the same parties and that the issue as to whether plaintiff was entitled to mandatory injunction was not directly and substantially in issue in earlier suit or that such issue was not finally decided between the same parties by competent civil court. He submitted that only an application to amend the plaint was given at the earlier

stage of the suit when the defendants in blatant disregard of the order of maintenance of status quo, proceeded to complete the illegal and unauthroised construction and rejection of such application would not operate as bar of res judicata to the filing of another application to amend the plaint so as to introduce the relief of mandatory injunction. Mr. Jani however submitted that when a suit for declaration as to existence of a right of way over open parcel of land belonging to the defendants is instituted and relief of permanent injunction is also prayed for, if the defendant comes out with the case that he has already put up construction or it is found that construction is put up despite direction by the trial court to maintain status quo issued to both the parties, it becomes necessary for the plaintiff to amend the plaint so as to introduce the relief of mandatory character requiring the defendants to remove the construction so placed on the open parcel land. In his submission, such amendment was absolutely necessary for the purpose of determining the real question in controversy between the parties. He submitted that even otherwise it is open to the plaintiff to file another suit for mandatory injunction and filing of such suit would encourage multiplicity of suits. Even on the pleadings of the parties, a question would directly arise before the trial court as to whether an offending construction was put up subsequent to the date of the institution of suit and in violation of the order of injunction and the Court shall have to pass necessary order if it finds that the construction was put up in blatant disregard of the order of injunction after the institution of the suit. In his submission, such an amendment was therefore absolutely necessary to enable the court to decide all the issues which may arise in this very suit.

9. Mr. R.C. Jani, learned Counsel appearing for the respondents defendants on the other hand submitted that doctrine of res judicata operates even at different stages of the same proceedings and if once an application for amendment of plaint to introduce the relief of mandatory nature is rejected by the court on merits and when such order has become final, second application of this nature was not permissible and was barred by principle of res judicata.

10. Very recently, this Court had the opportunity to deal with and decide an identical question in the case of HINDUSTAN ZINC LTD v. M/S VIJAYSINH AMARSINH & CO., reported in 1994 (1) GLR 161. In the case before this court it was a question of institution of a subsequent

suit and applying for an ad interim injunction against enforcement of Bank Guarantee after such injunction was consecutively refused in the earlier suit filed by the same parties by all courts upto the stage of Supreme Court. In the second suit, on an application for temporary injunction, the trial court granted interim injunction against enforcement of Bank Guarantee and it was in the aforesaid fact situation that a contention was raised before this Court as to whether the second application in the suit filed by the same party against the same defendant was barred of principle of res judicata. This Court in Para 16 of the reported judgment made exhaustive reference to various decisions of the Supreme Court and recorded its conclusions. The said observations of this Court can be quoted hereunder:

"It is now well settled that principle of res judicata applies to orders at different stages of the trial. Even as regards interlocutory orders such as stay of injunction it is well established that it would be an abuse of the process of the Court to apply for some relief by successive applications when such relief is already rejected by the Court. This general principle of law is clearly stated by the Supreme Court in the case of Satyadhyan Ghosal v. Deorajin Debi, reported in AIR 1960 SC 941 in following words:

"The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. When a matter whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. The principle of res judicata is embodied in relation to suits in Sec.11 of the Code of Civil Procedure; but even where Sec.11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis

that the previous decision was correct.

The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings."

Having so stated the law the Supreme Court proceeded to consider the question as to what would be the position when at an earlier stage of the litigation a Court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie and the principle of res judicata is pressed into service before the higher Court at a later stage of the same litigation. The Supreme Court considered three decisions of the Privy Council and observed:

"The very fact that in future it will not be open to either of the parties to challenge the correctness of the decision on matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term. When a Court has decided the matter it is certainly final as regards that Court. Should it always be treated as final in later stages of the proceedings in a higher Court which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred."

The question which was posed was answered by the Supreme Court thus:

"It is clear, therefore, that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final

decision as in the cases of other interlocutory orders. The second subsection did not apply to the Privy Council and can have no application to appeals to the Supreme Court, one reason being that no appeal lay to the Privy Council or lies to the Supreme Court against an order of remand."

It is thus clear that with a view to giving finality to the order of the Court rendered in the same proceeding between the same parties principle of res judicata is held applicable so far as the Court passing the order is concerned.

This very principle was affirmed by the Supreme Court in the later case of Arjun Singh v. Mohindra Kumar, reported in AIR 1964 SC 1993 by following observations:

"That the scope of the principle of res judicata is not confined to what is contained in Sec.11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits."

The Court then proceeded to consider its earlier decision in the case of Satyadhyan (supra) and after quoting relevant passage from the same judgment proceeded to state the law thus:

"If the Court which rendered the first decision was competent to entertain the suit or other proceedings and had, therefore, competency to decide the issue or matter, the circumstances that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being res judicata in later proceedings. Similarly, as stated already, though Sec. 11 of the Civil P.C. clearly contemplates the existence of two suits and the findings in the first being res judicata in the later suit, it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceedings. But, where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being

reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable."

The Supreme Court thereafter proceeded to consider Sec. 105 of the Civil P.C. and the decisions of the Privy Council which were considered in Satyadhyan's case (supra) and thereafter it elaborately restated the law thus:

"It is needless to point out that interlocutory orders are of various kind; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not of course put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts, or new situations which subsequently emerge. As they do not impinge upon the legal rights of the parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court. There are other orders which are also interlouctory but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under O. IX R.7 would be an illustration of this type. If an application made under the provisions of that Rule is dismissed and an appeal were filed against the decree in the suit in which suit application were made, there can be no doubt that the propriety of the order rejecting the reopening of the

proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate Court. In that sense, the refusal of the court to permit the defendant to "set the clock back" does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the Rule of res judicata does not apply, it would not follow that on every subsequent day on which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of indentical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the Court does not however necessarily rest on the principle of res judicata. Thus, if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any Rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision of a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issues, whereas in the other case, on proof of fresh facts, the Court would be competent nay would be bound to take those into account and make an order conformably to the facts freshly brought before the Court."

From the aforesaid observations of the Supreme court it becomes clear that the principle of res judicata though may not apply stricto sensu to interlocutory proceedings such as for stay or temporary injunction repeated applications for the same reliefs made on the same basis should be rejected as amounting to the abuse of the process of the Court. In the absence of any fresh or new material having bearing on the grant of relief, which is already refused, it is not open to a party to apply once again for the same relief and

> the Court would be justified in rejecting such applications, though not on the principle of res judicata but on the ground that such application having been rejected earlier on merits, it would amount to an abuse of the process of the Court to entertain the same."

11. From the aforesaid quotation and the observation of the Supreme Court therein, it becomes clear that principle of res judicata is based on the need of giving a finality to judicial decisions. What Section 11 says is that once a res is judicata, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. It is also required to be noted that primarily the principle of res judicata is embodied in relation to suits but even where Sec. 11 does not apply, the principle of res judicata has been applied by Courts of law for the purpose of achieving finality in litigation. The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceeding. As regards interlocutory orders passed at different stages of the same suit between the same parties, the Apex Court has held that when at an earlier stage of the litigation the Court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, the matter is certainly final as regards that Court. However, it should not be treated as final in later stages of the proceedings in a higher Court which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred. It is very clear that with a view to attaching finality to the order of the court rendered in the same proceeding between the same parties at a stage, principle of res judicata or principle of abuse of the process of the Court is applied so as not to permit the same party to reagitate the same question before that very court. The interlocutory orders are of various kinds such as order of stay, injunction or receiver. Such orders are designed to preserve status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay. Such orders do not decide in any manner the merits of the controversy in issue in the suit and do not of course put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief as Order 39 Rule 3 makes it abundantly clear. Such orders do not impinge upon the legal rights of the parties to the litigation and therefore rule of res

judicata is not strictly applied though the very court may reject the subsequent application as an abuse of the process of Court. The Apex Court has also referred to other interlocutory orders which fall in a different category, such as, an application under Order 9 Rule 7 of the C.P. Code. In such cases, though rule of res judicata does not strictly apply on the ground of abuse of the process of court, the trial court once moved by identical application at different stages, can refuse to exercise its power. However, it shall have to be kept in mind that there is nothing to preclude the High Court when the trial court has decided the matter to exercise its revisional jurisdiction. The order is certainly final as regards the trial court. It may be treated as final in later stages of the proceeding in the same court. However, it cannot be treated as final in higher court which had not considered the application at all merely on the ground that against the earlier order passed no appeal lay or no appeal was preferred. A higher court when moved by way of an appeal or in its revisional jurisdiction, if it finds that both the initial as well as subsequent order passed by the trial court were in total disregard of the salutary principle for grant of amendment under Order 6 Rule 17 of the C.P. Code and they were palpably and manifestly illegal and unjust and further that the order of the trial court in substance amounted to refusal to exercise jurisdiction which was vested in it by law, the doctrine of res judicata or abuse of the process of the court cannot and should not muffle the higher court from exercising its power with a view to obviating the miscarriage of justice.

12. In view of the aforesaid settled legal position, it would be necessary to refer to the earlier order passed by the trial court below Exhibit 56 seeking an amendment in the relief clause of the plaint as the plaintiff has put up construction unauthorisedly after the grant of order of maintenance of status quo. The main objection against such application for amendment was that the plaintiff has not sought an amendment in the pleadings but has sought amendment only in the relief clause and therefore amendment should not be granted and second objection was that after the institution of the suit despite injunction defendant has put up construction and therefore a separate cause of action has arisen after the institution of the suit and therefore second suit can be filed but plaint cannot be amended. Both these objections found favour with the trial court and on absolutely unsustainable and jejune ground, the trial court illegally refused to exercise the jurisdiction

vested in it by law and rejected the application for amendment. It is undoubtly true that thereafter the Court Commissioner is appointed, panchnama is prepared and the extent of construction put up by the defendant is brought to the notice of the court and second application for amendment is now made whereby necessary particulars of offending construction are sought to be introduced in the plaint and secondly para containing cause of action as well as relief clause are sought to be amended. The trial court found itself bound by principle of res judicata as earlier application of the very nature was rejected. The Question is as to whether such order of the trial court when it is challenged before this Court in its revisional jurisdiction under Section 115 of the C.P. Code and when this court finds that earlier order of the trial court as well as the order subsequently passed which is under challenge are the orders which are misconceived in law and are quite contrary to the provisions of the order 6 Rule 17 of C.P. Code and/or also against the binding precedents of the Apex Court as well as of this court, the question is whether this court should not exercise its jurisdiction under Section 115 of C.P. Code on the ground that earlier order of the trial Court would operate as res judicata. This may be so vis-a-vis the trial court as it is bound by its own earlier order though the order was absolutely unjust, contrary to law and not sustainable in law at all. In my opinion, when such a fact situation arises and the High Court in its revisional jurisdiction is satisfied that both, the earlier order as well as the subsequent order are not sustainable in law at all and that there is no ground to deny amendment of the plaint, as such amendment is necessary to decide all issues that may arise between the parties in the same suit, the court must exercise its jurisdiction. In the amended provision of Section 115 of C.P. Code by proviso to Section 115(1) it is enacted that the High Court shall not under this Section vary or reverse any order made or any order deciding an issue, in the course of a suit, except where the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made. In the present case, the trial court in its earlier order also found that defendants put up construction after the filing of the suit and after granting of ad interim injunction and that would provide a fresh cause of action for a second suit. The relief of mandatory injuction can therefore be asked by the plaintiff by second suit and ultimately such relief shall have to be gone into by the Civil Court by consolidating both the suits.. Instead of that procedure, if the plaintiff amends the plaint because in blatant disregard of the order of the court,

the defendant has put up construction and plaintiff has pressed for mandatory direction to remove or demolish the construction which the defendant has so placed, it falls beyond ones comprehension as to how such an amendment can be said to be falling beyond the purview of Order 6 Rule 17 of C.P. Code when the matter is brought to this Court under Section 115 of the C.P. Code and when it is found by this court that to uphold the second order of the trial court would tantamount to perpetrating a failure of justice or would tantamount to putting premium over the unauthorised act of a party who has put up construction despite order of injunction, this court cannot refuse to exercise its revisional jurisdiction and cannot sustain an order of the trial court on the ground that since earlier order was passed on amendment application, the plaint cannot be amended. In my opinion, if such an order is allowed to stand on the ground that earlier order would operate as res judicata, it would result into substantial miscarriage of justice and this court shall have to interfere with such an order so as to see that multiplicity of suits is avoided and any issue which necessary arises in the suit, can be determined in the same suit without relegating the plaintiff to file a separate suit and thereafter to try two suits after consolidating the same. In fact, avoidance of multiplicity of litigation is one of the objectives which can be achieved by a pragmatic approach to Order 6 Rule 17 of C.P. Code. In my opinion, it is not correct to state that a fresh cause of action has arisen. In fact, defendant has by committing breach of the order of the court and by putting up construction compelled the plaintiff to amend the plaint and if such amendment is moved, the court of law cannot direct a party to institute another suit. It is in this fact situation that the order of the trial court shall have to be quashed and set aside and is hereby quashed and set aside and the amendment prayed for by the application at Exhibit 105 is granted. The plaintiff is directed to carry out the amendment within six weeks from the date of receipt of the writ and the defendant shall be at liberty to file additional written statement. Since the amendment is filed belatedly and amendment can be granted on certain terms and conditions, it is directed that the plaintiff shall pay the cost to the defendant which is quantified at Rs. 1,000/- and the plaintiff shall pay cost to the defendant. Rule is accordingly made absolute.
